No. 11,573

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER STEELE,
Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and ALFRED J. FRITZ and ROBERT MCWILLIAMS, as Judges thereof,
Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

It is apparent that the appellees have wholly misconceived the nature of the proceeding in the District Court, the points raised by appellant herein and the nature of the **right** which appellant claims is protected by the Fourteenth Amendment and which is denied by the laws of California, as such laws have been construed by the highest Court of that State.

It is appellant's contention that the **right** to be secure from unreasonable searches and seizures is

such a fundamental principle of liberty and justice that it falls within the protection of the Fourteenth Amendment, irrespective of the protection of such right from federal infringement by the provisions of the Fourth Amendment.

It is appellant's further contention that the decisions of the Supreme Court of California not only have destroyed and nullified this great right but have destroyed and denied the existence of any process, procedure or remedy in the state courts for the enforcement and protection of such right.

Where the State of California has denied all remedies for the enforcement of a constitutional right, the federal courts are open for the correction of such wrong and the enforcement of such right.

> "Furthermore, it cannot be doubted that if the State of Illinois should at all times deny all remedies to individuals imprisoned within the state in violation of the Constitution of the United States, the federal courts would be available to provide a remedy to correct such errors. Ex parte Hawk, 321 U.S. 114, 88 L. ed. 572, 64 S. Ct. 448."
>
> *Woods v. Nierstheimer,* 328 U.S. 211, 217, 90 L. ed. 1177, 1181.

See also

Carter v. Illinois, ... U.S. ....., 91 L. ed. Ad. Op. 157, 161.[1]

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[1]Erroneously cited on page 30 of Appellant's Opening Brief as 90 L.ed. Advance Opinions.

Appellees state the proposition as if this were an appeal from an order remanding the criminal prosecution back to the state Court. On page 4 of their brief, appellees state that they moved to dismiss the proceeding and to remand the criminal action and that the motion was granted on February 25, 1947. This is incorrect. On February 25, 1947 the District Court made an order (R. 31) dismissing the complaint filed in equity for an injunction. No order was ever made remanding the criminal cause to the state Court.[2]

This is an appeal from an independent suit in equity brought to enjoin the state courts from usurping the jurisdiction of the Federal District Court. The suit is predicated on the ground that under the removal statute (28 U.S.C.A. 74), a criminal action originally started in the state Court had been removed to the District Court. The only question involved is whether the complaint for an injunction states a cause of action. This in turn depends on whether the removal petition, attached as an exhibit to the complaint, stated facts sufficient to remove the criminal prosecution into the District Court. The entire matter resolves itself into the query of whether the right to be secure against unreasonable search and seizure is a right protected by the Fourteenth Amendment

[2]Since the docketing of this appeal in this Court, appellees moved the District Court for an order dissolving the injunction issued to hold matters in *status quo* and to remand the criminal cause back to the State Court. The District Judge denied each of these motions on the ground that appellant had raised a grave constitutional question and was entitled to have the same determined by this Court.

from infringement by the states. If such right is protected by the Fourteenth Amendment, then the complaint stated a cause of action and, if the complaint did state a cause of action, then the criminal prosecution was removed from the state Court to the District Court.

Appellees have not briefed this question and rely upon the decisions of the Supreme Court of the State of California. It is these very decisions which deny the existence of the right to be secure from unreasonable searches and seizures and which hold that there is no remedy in the state Courts for the protection or enforcement of such right.

Where a petition for removal of a cause from the state Court to the federal Court has been properly filed in the state Court and the cause docketed in the federal Court, such federal Court has the right and power to protect its own jurisdiction by injunctive relief and such injunctive relief may be granted in an ancillary proceeding filed in the federal Court praying for such injunction. In this regard see the following cases:

Atchison T. & S. F. Ry. Co. v. Smith (C.C.A.-9), 47 Fed. (2d) 223;

People v. Lamson, 12 Fed. Supp. 812.

THE DOCKETING OF THE REMOVAL PETITION CONFERRED JURISDICTION ON THE DISTRICT COURT AND REMOVED THE CRIMINAL PROSECUTION INTO THAT COURT.

Appellees contend that the filing of the removal petition in the state court and the subsequent docketing of the same, together with all other papers in the criminal cause, in the District Court of the United States did not operate to transfer the criminal cause to the District Court or vest that court with jurisdiction thereof. In support of their contention, appellees cite the following cases:

People v. Lamson, 80 Fed. (2d) 388;
Ex parte State of Alabama, 71 Ala. 363;
Southern Pacific Co. v. Haight, 126 F. (2d) 900.

We have no fault to find with the holdings in the foregoing cases. In substance they merely hold that the mere filing of a paper does not transfer jurisdiction from one court to another; that the state court has the right to examine the petition for removal and to determine whether or not it states facts sufficient for the removal of the cause and, if such facts are not stated, to proceed with the trial of the criminal action.

This is a situation that is not presented to this Court. We are not here concerned with whether the state Court is or is not going to proceed with the criminal trial for the reason, among others, that they have been enjoined and restrained from so proceeding. The sole question presented is whether the cause as a matter of law and fact has been removed to the

District Court. The removal statute (28 U.S.C.A. 74) provides that "upon the filing of such petition, all further proceedings in the state Courts shall cease", and that upon the docketing of the case in the District Court "the said Court shall then have jurisdiction therein". It should be manifest that something more was contemplated by the statute than the mere useless acts of filing a removal petition and docketing of the cause, leaving the state Court to proceed at its pleasure. **The state Court must be divested of all jurisdiction if the removal petition states facts sufficient to bring the cause within the purview of the statute.** In other words, if the removal petition is sufficient and states facts sufficient as contemplated by the statute, then the cause is removed to the federal Court and the state Court is without jurisdiction. The sufficiency of the removal petition is the very question presented by this appeal, a question that has not been answered by appellees.

AS TO INTRODUCTION OF EVIDENCE OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURE.

Appellees contend on page 9 of their brief that the Fourth Amendment has no application to state procedure. We thought it was clearly stated in our opening brief that appellant does not contend that the Fourth Amendment operates upon the states and that we had clearly distinguished between the **right** to be secure from unlawful searches and seizures and

the incorporation of such right into the Fourth Amendment. (See footnote on page 31 of Appellant's Opening Brief.) Thus appellees' argument that the Fourth Amendment does not operate on the states is beside the point.

Next, appellees contend that the right to introduce competent evidence, during the course of the trial, will not be denied solely on the ground that the evidence was unlawfully acquired. This proposition we have also admitted on page 15 of Appellant's Opening Brief.

But the fact that a trial Court will not stop a trial to ascertain in what manner competent evidence was procured, is a proposition entirely different from whether or not the state has provided any procedure **anterior to the trial** whereby the use of evidence acquired by unreasonable and unlawful search and seizure can be suppressed.

Where a state provides a remedy and procedure for the protection of the constitutional right, such remedy must be pursued by the person injured, otherwise he cannot complain at his trial of the introduction in evidence of the objects acquired by an unreasonable search and seizure. **Where, however, the state denies any such process and remedy anterior to the trial,** the question is not as to the right of a trial Court to admit such illegally acquired evidence, but resolves itself into the proposition that **the denial of such corrective and protective process in itself constitutes a denial of due process of law.**

In our opening brief we have demonstrated, by quotations from decisions of the California Supreme Court, that no remedy is available in the Courts of that State to protect the great right to be secure against unreasonable search and seizure. This is admitted by appellees on page 10 of their brief where they state "as indicated in *People v. Gonzales,* 20 Cal. (2d) 165, at page 169, **the only recourse** that the defendant may have is in civil and criminal remedies directly against the officers for their illegal acts."

If the only recourse a defendant may have is in civil and criminal remedies directly against the officers for their illegal acts, then it stands admitted that there is no process whereby the Constitutional right can either be protected or enforced. To prosecute a state officer for illegal entry or burglary, as the case may be, neither protects nor enforces the Constitutional right. To bring a civil action against the officers for damages for such illegal entry or unlawful taking of personal property does not protect or enforce the Constitutional right. These remedies merely compensate the defendant for a violation of his right or punish the state officer for violating the right. These remedies leave the violation of the right in exactly the same position as if such remedies had not been pursued. **In other words, restricting a defendant to civil and criminal remedies against the state official does not even pay lip service to the Constitutional right, but constitutes a declaration that once the right is violated a defendant in a criminal action must suffer all of the consequences of such violation and is**

impotent to invoke any judicial process whereby he can be placed in the position he occupied prior to the violation of such right.

Lastly, on this point, appellees argue that nothing can be gained by appellant by the removal into the federal Court of a criminal prosecution. This conclusion is based on the false premise that if the case were tried in the federal Court, the illegally acquired evidence could not be suppressed or excluded because no federal officer participated in its acquisition.

It is true that in prosecutions instituted in the federal Courts, for a violation of federal laws, it has been held that the Fourth Amendment only prohibits the use of evidence illegally acquired by federal officials. However, the removal of a state prosecution to the federal Courts does not turn it into a federal prosecution for a federal offense. The action still remains a state prosecution for a state offense, the only difference being that in the trial held in the federal Court, the accused will be assured all of his Constitutional rights. **It is for the purpose of insuring unto the accused the Constitutional rights denied him by the state law that the removal is permitted at all.** While the removal proceeding results in a change of forum, it does not change the nature of the charge, trial or prosecution.

WHERE PROVISIONS OF THE FEDERAL AND A STATE CONSTITUTION ARE IDENTICAL, ADOPTED TO SAFEGUARD THE SAME RIGHTS AND PREVENT OR CORRECT THE SAME EVILS, THEIR CONSTRUCTION AND APPLICATION MUST BE THE SAME.

Appellees have laid stress on the fact that Article I, section 19 of the California Constitution, reading as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

can be construed by the Supreme Court of California in any way it sees fit and that such Court has construed it as merely prohibiting the unlawful search and seizure, while allowing the fruits thereof to be used as evidence in a criminal trial against the person whose constitutional right has been violated.

That this provision of the California Constitution and the Fourth Amendment to the Federal Constitution were each adopted for the same reasons and to correct and prevent the same evils can brook no argument. The Supreme Court of California has so stated in *People v. Mayen,* 188 Cal. 237, 249,

> "It may be taken for granted that the provisions of our own constitution and those of nearly all the states of the Union against unreasonable searches and seizures, and protecting the citizen from being compelled in any criminal case to be a witness against himself, **have been adopted, in**

almost the precise words and for the same reason, as in the federal constitution. They are safeguards designed to protect the intimate sanctity of the person and the home from invasion by the state."

The adoption of both the State and Federal Constitutional provisions against unlawful searches and seizures having been brought about as the result of the same evils, to correct the same abuses and to accord the same rights they each must be given the same interpretation and effect.

"But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties however differently worded, should have as far as possible the same interpretations; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be 'compelled to accuse or furnish evidence against himself;' such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be 'compelled in any criminal case to be a witness against himself'." (Emphasis added.)

Counselman v. Hitchcock, 142 U. S. 547, 584, 35 L. ed. 1110, 1121.

But appellees argue that this Court is bound by the construction of the State Constitutional provision involved. Assuming the correctness of this premise for the sake of argument, what do we find? That the State Supreme Court has so construed the provision that there is no remedy, process or procedure whereby one, whose constitutional right has been violated, can be placed in the position he occupied prior to the violation of such right. Once his right to security has been violated by state officers he must suffer all the consequences of such violation; he cannot move to exclude or suppress as evidence the articles seized, he cannot have reviewed in the state appellate Courts the admission of such articles as evidence. In fact, he is in identically the same position as if no such prohibition appeared in the Constitution or laws of California.

If this Court is bound by the California decisions, then this Court must hold that by such decisions the State of California has denied the existence of the right and has failed to provide any remedy or process for its enforcement or protection.

But, this Court is not bound by any state construction of its constitution or laws, where such construction renders it in conflict with any provision of the Constitution of the United States.

RESPECTABLE FEDERAL AUTHORITY EXISTS IN SUPPORT OF APPELLANT'S CONTENTION.

In *Hague v. C. I. O.*, 101 Fed. (2d) 774, the United States Circuit Court of Appeals for the Third Circuit, in holding that the right to be secure from unlawful search and seizure was protected by the Fourteenth Amendment from state violation, said:

> "The Fourth Amendment to the Constitution of the United States provides, 'The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, * * *.' The right so protected is a fundamental civil right and in our opinion is a privilege of Federal citizenship. **As such it is secured against abridgment by the states by the privileges or immunities clause of the Fourteenth Amendment as well as by the due process clause of that Amendment.**" (p. 781.)

> "* * * it is elementary that the Bill of Rights was designed as a curb upon the power of the Federal government which it was feared might encroach upon the rights of the states. We are unable to perceive any reason, however, why the right to be free from unreasonable searches and seizures set forth in the Fourth Amendment should not stand upon a parity today with freedom of religion, of speech, of the press and of assembly as guaranteed by the First Amendment. All of these rights are of equal importance to the individual and in our opinion they stand as pari materia.

> "Liberty of the person, including freedom of locomotion, is, as we have seen, one of '* * *

> the privileges or immunities of citizens of the United States * * *' protected by the Fourteenth Amendment against abridgment by the States. Among those rights and liberties of which the states may not deprive the individual under the due process clause of that Amendment are freedom of speech, Stromberg v. California, 283 U. S. 359, 51 S. Ct. 332, 75 L. Ed. 1117, 73 A. L. R. 1484, and freedom of the press, Gitlow v. New York, supra. **In our opinion freedom from unreasonable searches and seizures is included as well.**" (pp. 787-8.)
>
> "**It follows therefore that the fundamental civil rights secured to citizens of the United States by the First and Fourth Amendments are secured in the sense of being protected or guaranteed against interference by State action by the Fourteenth Amendment.**" (p. 788.)

(The Supreme Court took over the above case but declined to pass on the question. [307 U. S. 496, 83 L. Ed. 1423.])

THE ORDER OF THE DISTRICT COURT DISMISSING THE COMPLAINT IS AN APPEALABLE ORDER.

Appellees, as a mere *ipse dixit,* state that "The order * * * dismissing the complaint is conclusive, from which an appeal may not be taken," following which, on page 13 of their brief, there is cited seven cases and sec. 71 of 28 U.S.C.A.

Reading the section cited and the seven cases demonstrates that appellees are confused as to the matter

before the Court. The section and cases relate to an order remanding a cause to the state Court and have nothing to do with an order dismissing a complaint for an injunction.

Heretofore, in April of this year, appellees noticed a written motion before this Court to dismiss the appeal and advanced this identical point as a ground for such motion. On June 7, 1947, the motion came on for hearing before this Court and after argument was denied from the bench. This Court at that time held that an order dismissing a complaint in equity is an appealable order. Such is the law.

28 *U.S.C.A.*, sec. 227 (Judicial Code, sec. 129), expressly provides that when, in a District Court "an injunction is granted, continued, modified, refused or dissolved * * * an appeal may be taken from such interlocutory order or decree to the Circuit Court of Appeals." Here the appeal was taken from the order 'granting defendants' motion to dismiss the complaint in the above entitled action and dismissing said complaint and indirectly denying complainant's application for an interlocutory injunction." (R. 32.)

In *Miami Paper Co. v. American Woodpulp Corp.* (C.C.A.-6), 5 Fed. (2d) 408, the Court held:

> "Motion to dismiss the appeal must be denied. Appeal is the proper remedy to secure a reversal of a decree dismissing a bill in equity."

See also:

United States v. City S. B. & T. Co. (C.C.A.-6), 73 Fed. (2d) 486.

28 *U.S.C.A.*, sec. 225, gives this Court appellate jurisdiction to review by appeal final decisions in the District Court. An order dismissing a suit is a final decision.

Appellees rely on 28 U.S.C.A. sec. 71. This section provides for the removal from the state to the federal Courts of "**any suit of a civil nature,** at law or in equity, arising under the Constitution or laws of the United States * * * of which the District Courts of the United States are given original jurisdiction" and for the removal of causes based on diversity of citizenship. This section further provides that if the District Court ordered "the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such case shall be allowed." **This section 71 has no application to the case at bar,** and all the cases cited on page 13 of appellees' brief relate to orders of remand made under this section.

The removal proceedings herein were taken under 28 U.S.C.A. sec. 74, which provides for the removal of "**any civil suit or criminal prosecution** * * * against any person who is denied or cannot enforce in the judicial tribunals of the state * * * where such suit or prosecution is pending, any rights secured to him by any law providing for the equal civil rights of citizens of the United States." This section 74 contains no provision that no appeal shall be allowed from any order remanding such suit to the state Court.

No order remanding the cause was ever made. The propriety of such an order is not before this Court.

CONCLUSION.

Appellant's briefs herein have clearly established the following propositions, propositions which find no refutation in the brief for appellees:

1. The right to be secure from unreasonable search and seizure is a fundamental principle of liberty and justice to be regarded as of the very essence of constitutional liberty and is therefore protected from state violation by the Fourteenth Amendment;

2. The action of the state officers, in breaking and entering appellant's home without a warrant and taking the property therefrom, was a violation of such right;

3. The decisions of the California Supreme Court have repeatedly and consistently held that property acquired in such manner (a) cannot be excluded from evidence at the owner's trial under any circumstances; (b) that the California law neither recognizes nor provides any procedure or process whereby the accused, even though he make timely objection, can have the property so taken returned to him or suppressed as evidence; (c) that even though timely objection be made and such evidence be admitted over the accused's objection, the question of the admission in evidence thereof cannot be reviewed on appeal from a judgment of conviction or in any other manner;

(d) that there is no procedure known to or allowed by the laws of California whereby the victim of such unlawful search and seizure can be again placed in the position he occupied prior to the search and seizure.

4. The complaint herein and the petition for removal set up the Constitutional right, the violation of such right, the foregoing holdings of the State Supreme Court and the inability to enforce in the state Courts such rights. The complaint stated a cause of action and the order dismissing the cause should be reversed.

Dated, San Francisco,
September 26, 1947.

Respectfully submitted,
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